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From: Harlow, Brooks
Sent: Friday, December 16, 2005 4:48 PM
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Subject: Conference Call Requested re CC Docket 96-128

First, thank you for asking Don Stockdale to get in touch with me when I was in visiting D.C. from Seattle last month. We had a very informative and productive meeting.

Second, I am attaching a November 23, 2005 letter from the Oregon Public Utility Commission ("OPUC") addressed to Chairman Martin regarding CC Docket No. 96-128 (the "Payphone Docket"). The OPUC requests prompt action by the Commission on petitions for declaratory ruling in the Payphone Docket to serve as guidance for a similar docket pending at the OPUC. Although they are not explicitly identified by the OPUC, the letter clearly refers to the petitions filed by the Illinois Public Telecommunications Association ("IPTA") (July 30, 2004), the Independent Payphone Association of New York ("IPANY") (December 29, 2004), and the Southern Public Communications Association ("SPCA") (November 9, 2004) (hereafter, "Petitions").

In the similar OPUC docket we represent complainant Northwest Public Communications Council ("NPCC"), which seeks refunds for Qwest charges from 1997 to 2003 for public access lines ("PAL") at rates that the Oregon Court of Appeals found violated the FCC's New Services Test ("NST") (as applied and interpreted in the Payphone Docket). *Northwest Comm. Coun. v. Public Util. Comm'n of Or.*, 100 P.3d 776, 778 (Or. App. 2004)

Because the OPUC was reversed in 2004 on its interpretation of the FCC's application of the NST to PAL rates (in an Order issued before FCC Order No. 02-25 in the Wisconsin case), the OPUC sensibly seeks guidance from the Commission before issuing a ruling on NPCC's refund claim. Some of Qwest's defenses to the OPUC action raise the same issues that are involved in the IPTA petition. A ruling by the Commission on the points discussed below would enable the OPUC to properly interpret and apply federal law to the claim against Qwest.

To give you a little more background, like Ameritech in Illinois, Qwest in Oregon requested and obtained a temporary waiver of the NST compliance requirement, and then litigated over its proposed PAL rates from 1997 until 2003. Qwest ultimately lost on the merits and then was forced to dramatically lower its PAL rates. Qwest's rates fell from over \$34 per month in early 1997 to under \$10 in 2003. Also like Ameritech—in spite of a final and unappealable order holding that Qwest's 1997 rates did not comply with the NST or Section 276(a) of the Communications Act—Qwest has refused to refund its unlawful overcharges. In addition to the OPUC case, a complaint by 51 payphone companies is pending with the Ninth Circuit Court of Appeals regarding Qwest's alleged violation of the NST and Section 276(a) in 11 other states.

We recognize that each of the Petitions may have certain unique aspects. Nevertheless, they also raise broad issues that are common to the Petitions as well as to the cases against Qwest in two forums covering 12 states. We believe the Commission can issue an order on the Petitions that will provide guidance to the OPUC and the Ninth Circuit which will help ensure that the Commission's orders are applied uniformly and consistent with their purpose, which was to properly implement Congress' directive that, effective on April 15, 1997, "any Bell operating company . . . shall not prefer or discriminate in favor of its payphone service." In particular:

1. The FCC should declare that the “filed tariff” doctrine has no impact on the refund obligation. Section 276 and the orders in the Payphone Docket expressly adopted federal regulations. The Waiver Order (DA 97-805, Apr. 15, 1997, a/k/a “Refund Order”) imposed federal conditions for waiver of a federal requirement, and the RBOCs expressly waived any filed rate doctrine claims. The filed tariff doctrine that the RBOCs are asserting is founded on state law, because the rates were filed with state commissions, not a federal agency. Thus under the Supremacy Clause of the U.S. Constitution, the filed tariff doctrine cannot block refunds.

2. The FCC and state commissions should interpret the Refund Order broadly to require refunds by RBOCs regardless of whether they made a voluntary rate filing within the 45 days following the Refund Order. Such an interpretation is necessary because:

a. Failure to require refunds undermines Section 276(a). It would have the effect of allowing unlawful discrimination, in some cases (such as Oregon) for many years after the RBOCs were required to have stopped discriminating. Even absent the Refund Order, PSPs should have a right to refunds as damages for RBOCs’ discrimination (e.g. under 47 U.S.C. Sec. 207) for charges that exceeded what the NST permitted going back as far as the longest applicable statute of limitations will allow.

b. Without a federal ruling that refunds are required, the states will continue to inconsistently interpret and apply the FCC's rules and orders. For example, in one state, an RBOC that made a good faith effort to fully and timely comply with the FCC 's order may be held liable for refunds, while in another state, an RBOC that did not seriously attempt to comply may be held exempt from refunds.

c. The 45 day limitation in the Refund Order should be construed as a limitation on the RBOCs’ right to collect DAC, not on the obligation to pay refunds. The intent of the 45 days was to ensure prompt action. Interpreting the 45 days as a limitation on refunds rewards delay, which is the exact opposite of the order's intent in setting the 45 day limit.

Since we were not able to meet in person last month, I would appreciate it if we could arrange a conference call in the next few weeks so that I could provide you a bit more background regarding the Qwest matters and answer any questions that you might have.

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OPUC letter to
Martin 11-23-0...



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November 23, 2005

Chairman Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: CC docket 96-128

Dear Chairman Martin:

We are writing to request prompt Commission action in CC Docket 96-128, the Consolidation Petition proceeding. Commission action in the docket would allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*).

This letter is prompted by a specific issue we are addressing. Specifically, we must determine whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" established in the Commission's *Payphone Orders*. This determination has been mandated by the Oregon Courts.

The Oregon Commission could, of course, interpret Order DA 97-885 in an order. If we were to do so, however, we are certain that either Qwest or the PSPs would appeal our decision. This would likely lead to several years of litigation concerning issues that can best be resolved by your Commission. The only way to avoid such a scenario would be for the Commission itself to interpret the *Waiver Order*. That is why we are requesting that the Commission act as expeditiously as possible in CC Docket 96-128.

Thank you for your consideration.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

cc: Brooks Harlow, Miller Nash
Don Mason, Qwest